

**M. TERESA DALEY LAW OFFICES, P.C.**

520 Eighth Avenue, 24<sup>th</sup> Floor

New York, New York 10018

Phone: 212-560-3943 Fax: 917-351-0983

e-mail address: [alawrence@newmarkkf.com](mailto:alawrence@newmarkkf.com)

M. Teresa Daley  
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Andrea J. Lawrence  
Of Counsel

November 12, 2010

Via e-mail at  
[scc.chambers@nysb.uscourts.gov](mailto:scc.chambers@nysb.uscourts.gov)

Honorable Shelley C. Chapman  
United States Bankruptcy Court  
Southern District of New York  
One Bowling Green – Courtroom 610  
New York, New York 10004

Re: In re 2626 BWAY LLC  
Docket No.: 10-14731 (SCC)

Dear Judge Chapman:

We represent Broadway Metro Associates, L.P. (“Broadway Metro”), a creditor of Debtor as well as its landlord at the building located at 2626 Broadway, New York, New York (the “Premises”). At the evidentiary hearing held on November 9, 2010 arising from Broadway Metro’s motion to vacate the automatic stay and/or dismiss this proceeding on the basis it was filed in bad faith, the Court requested that the parties provide it with case law as to whether or not this Court has the power or authority to order Debtor to immediately surrender possession of the Premises to Broadway Metro as a result of Debtor’s failure to pay post-petition use and occupancy to Broadway Metro. Based upon our review of the facts herein, as well as the relevant statutory and case law, it is our conclusion that this Court can, in fact, order Debtor to immediately surrender possession of the Premises to Broadway Metro.

It cannot be disputed that this Court has wide discretionary latitude to vacate the automatic stay and to take any other actions in connection therewith, including immediately directing Debtor to surrender the Premises to Broadway Metro. *In re Sonnox Industries, Inc.*, 907 F.2d 1280, 1286 (2d Cir. 1990). Indeed, 11 U.S.C.S. § 105(a) provides:

The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action

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Judge Chapman

or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

Thus, we believe that this Court's discretion to vacate the automatic stay further extends to its ability to direct Debtor to immediately surrender possession of the Premises to Broadway Metro.

Moreover, as pertinent case law in this jurisdiction shows, this Court has the authority to direct Debtor to return possession of the Premises to Broadway Metro immediately. *Dennis Griggs v. 25 Realty Associates, LLC*, 2002 U.S. Dist. LEXIS 5977 (S.D.N.Y. 2002), is particularly instructive on the issue as to whether this Court can immediately order Debtor to surrender possession of the Premises to Broadway Metro. In *Griggs*, the debtor, a licensee of the tenant, filed a voluntary bankruptcy petition for Chapter 13 relief. The debtor failed to pay post-petition rent to the landlord, and the landlord moved to vacate the automatic stay pursuant to 11 U.S.C.S. § 362(a). In addition to permitting the landlord to "pursue all of its rights and remedies against the debtor," the bankruptcy court also ordered the debtor to "quit, vacate and surrender possession" of his apartment and return all keys to the landlord. *Griggs* at \*3. The appellate court affirmed this decision in all respects. See also *In re Cobham Enterprises, Inc.*, 72 B.R. 779 (Bankr. S.D.N.Y. 1987) (directing debtor to surrender possession of premises); *In re Flexipak, Inc.*, 49 B.R. 641 (Bankr. S.D.N.Y. 1985) (directing debtor to immediately surrender possession of premises to landlord in the event it did not assume lease).

Here, an application of the aforesaid statutory and case law to the facts mandate that the Premises immediately be surrendered to Broadway Metro. First, Debtor no longer has any property interest in the Premises. Specifically, Broadway Metro terminated the Lease pursuant to a Notice of Termination dated June 22, 2010, which terminated the Lease effective as of June 28, 2010. A copy of the Notice of Termination is annexed as **Exhibit 1**. The date of termination was prior to the filing of this bankruptcy proceeding on September 3, 2010. The Notice of Termination, which was prepared and served in accordance with the Lease, terminated Debtor's right and interest in the Premises. Thus, for this reason alone, Debtor has no property interest in the Lease, and this Court should order Debtor to immediately surrender possession of the Premises to Broadway Metro without the need to resort to state court proceedings. See e.g., *In re Seven Stars Restaurant, Inc.* 122 B.R. 213 (Bankr. S.D.N.Y. 1990), citing to *First Nat'l Stores, Inc. v. Yellowstone Shopping Center, Inc.*, 21 N.Y.2d 630, 290 N.Y.S.2d 721, 237 N.E.2d 868 (1968); see also *Comp III, Inc. v. Computerland Corp.*, 136 B.R. 636 (Bankr. S.D.N.Y. 1992) ("where an executory contract has been terminated in accordance with its terms prior to bankruptcy, section 365(e)(1) does not authorize the bankruptcy court to reach beyond the veil of the petition to reinstate the contract"); see also *In re Scarsdale Tires Inc.*, 47 B.R. 478 (Bankr. S.D.N.Y. 1985) ("it is settled law that a lease or license that was terminated before the filing of a bankruptcy petition is neither affected by the automatic stay under 11 U.S.C. §362(a) nor may it be assumed by the debtor under 11 U.S.C. § 365").

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Judge Chapman

Additionally, Debtor breached this Court's Order dated October 12, 2010 by failing to pay post-petition use and occupancy to Broadway Metro by November 2, 2010. A copy of the relevant transcript from the October 12, 2010 hearing containing this Order is annexed as **Exhibit 2**. In fact, Debtor has not paid any post-petition use and occupancy to Debtor since the commencement of this proceeding on September 3, 2010, and Debtor's actions stand in violation of the Court Order as well as 11 U.S.C.S. § 365(d)(3). This serves as further justification for this Court to immediately order Debtor to surrender possession of the Premises to Broadway Metro. *See, e.g., In re Mad Lolo LLC*, 2009 Bankr. LEXIS 1333 (Bankr. S.D.N.Y. 2009); *Manhattan King David Restaurant, Inc. v. Levine*, 154 B.R. 423, 429 (Bankr. S.D.N.Y. 1993); *see also In re Flexipak, Inc.*, 49 B.R. at 642-643.

Thus, for the reasons set forth herein, Broadway Metro respectfully requests that this Court immediately order Debtor to surrender possession of the Premises to Broadway Metro.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Andrea J. Lawrence" followed by a stylized mark that looks like "H2" in parentheses.

Andrea J. Lawrence, Esq.

cc: Robert Sasloff, Esq. (via email)  
Robert R. Leinwand, Esq. (via email)  
M. Teresa Daley, Esq.

**Exhibit 1**

**BROADWAY METRO ASSOCIATES, L.P.**  
C/O Albert Bialek Associates  
249 West 34<sup>th</sup> Street, 2<sup>nd</sup> Floor  
New York, NY 10001  
212-751-2408

Dated: June 22, 2010

BY: HAND DELIVERY

2626 BWAY LLC  
c/o Seymour I. Hurwitz, Esq.  
19 W. 44<sup>th</sup> Street, Suite 1507  
New York, New York 10036

**THREE (3) DAY NOTICE OF TERMINATION OF LEASE**

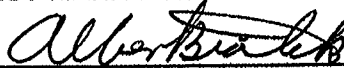
**PLEASE TAKE NOTICE** that pursuant to Article 19.2 of the Lease dated September 1, 2006 between Broadway Metro Associates, L.P., as Landlord ("Landlord"), and 2626 BWAY LLC, as Tenant, ("Tenant") hereinafter referred to as the "Lease," Landlord has elected to **TERMINATE THE LEASE** as a result of Tenant's failure to have cured Tenant's default as set forth in Landlord's Notice dated March 18, 2010, a copy of which is attached hereto, in that you have failed at all times during the Lease term and at Tenant's expense to provide and maintain in full force and effect with insurers approved by Landlord insurance as more specifically set forth and required pursuant to Article 13 of the Lease, and also based upon the decision of the Supreme Court of the State of New York, County of New York in an action entitled 2626 BWAY LLC v. Broadway Metro Associates, LP, Index Number 105635/2010 on June 15, 2010 wherein the Court found that Tenant failed to have insurance as required by Article 13 of the Lease and that Tenant's failure to do so was an incurable default.

**PLEASE TAKE FURTHER NOTICE** that on **June 28, 2010**, which date is more than three (3) days from the date this Notice is hand delivered to Tenant, the Lease shall terminate and the Lease term shall expire and terminate by limitation, and all rights of Tenant under this Lease shall cease.

**PLEASE TAKE FURTHER NOTICE** that in the event you fail to vacate and deliver possession of the Premises to the Landlord by the end of the day on June 28, 2010, the Landlord shall commence summary holdover proceedings to remove you from possession of the Premises.

Yours etc.,

**BROADWAY METRO ASSOCIATES, L.P.**  
By: **SEAVEST MANAGEMENT CORP., General Partner**

By:   
**ALBERT BIALEK, President**

**BROADWAY METRO ASSOCIATES, L.P.**  
**TO: 2626 BWAY LLC**  
**PAGE TWO**  
**THREE (3) DAY NOTICE OF TERMINATION OF LEASE**

**cc: Seymour I. Hurwitz, Esq., (by Hand)**  
**19 W. 44<sup>th</sup> Street, Suite 1507**  
**New York, New York 10036**

**cc: John Souto**  
**c/o 2626 BWAY LLC (by HAND)**  
**131 Christopher Street, Second Floor**  
**New York, New York 10014**

**cc: 2626 BWAY LLC (by HAND)**  
**131 Christopher Street, Second Floor**  
**Ew York, New York 10014**

**cc: David Tendler, Esq. (by HAND)**  
**Cornicello, Tendler & Baumel-Cornicello LLP**  
**Two Wall Street, 20<sup>th</sup> Floor**  
**New York, NY 10005-2072**

**FILE COPY**

**BROADWAY METRO ASSOCIATES, L.P.**  
C/O Albert Bialek Associates  
249 West 34<sup>th</sup> Street, 2<sup>nd</sup> Floor  
New York, NY 10001  
212-751-2408

Dated: March 18, 2010

BY: First Class Mail and Certified Mail Return Receipt Requested  
Receipt Number 7009 1410 0001 7871 9162

2626 BWAY LLC  
c/o Seymour I. Hurwitz, Esq.  
19 W. 44<sup>th</sup> Street, Suite 1507  
New York, New York 10036

**THIRTY (30) DAY NOTICE OF DEFAULT**  
Regarding Insurance as described herein

**PLEASE TAKE NOTICE** that pursuant to Article 19.2 of the Lease dated September 1, 2006 between Broadway Metro Associates, L.P., as Landlord, and 2626 BWAY LLC, as Tenant, ("Tenant") hereinafter referred to as the "Lease," Landlord has elected to serve this Thirty (30) Day Notice of Default upon Tenant because an Event of Default has occurred as referred to in Article 19.1.3 of the Lease in that Tenant failed for more than thirty (30) days after Tenant received Landlord's Notice dated January 7, 2010, a copy of which is attached hereto and made a part hereof, to comply with and perform its obligations as set forth in Article 13 of the Lease and as directed to do so in the aforesaid Notice.

**PLEASE TAKE FURTHER NOTICE** that you are hereby directed to comply with and perform Tenant's obligations as set forth in Article 13 of the Lease and as directed to do so in the attached January 7, 2010 Notice in that you must provide and maintain in full force and effect insurance, as more specifically set forth in and required by Article 13 of the Lease, with insurers approved by Landlord, and provide the Landlord with a copy of the original insurance policies or other appropriate evidence of the existence of all policies or renewal policies bearing notations evidencing the payment of the premiums therefore as referred to in Article 13 of the lease with insurers approved by Landlord within thirty (30) days from the date that Tenant receives this written Thirty (30) Day Notice of Default, to wit MAY 3, 2010 which date is more than the fifth business day after this Notice has been mailed to Tenant by first class mail and certified mail return receipt requested pursuant to Article 39.1 of the lease.

**PLEASE TAKE FURTHER NOTICE** that in the event you fail to cure this Event of Default by MAY 3, 2010 which date is more than thirty (30) days and more than the fifth business day after this Notice has been mailed to Tenant as aforesated, the Landlord shall terminate the term of the lease.

Yours etc.,

**BROADWAY METRO ASSOCIATES, L.P.**  
By: SEAVEST MANAGEMENT CORP., General Partner

By:   
ALBERT BIALEK, President

BROADWAY METRO ASSOCIATES, L.P.  
TO: 2626 BWAY LLC  
PAGE TWO

cc: Seymour I. Hurwitz, Esq., (by First Class Mail and Certified Mail  
Return Receipt Requested, Receipt No. 7009141000178719179  
19 W. 44<sup>th</sup> Street, Suite 1507  
New York, New York 10036

cc: John Souto  
c/o 2626 BWAY LLC (by First Class Mail and Certified Mail  
Return Receipt Requested, Receipt No. 7009141000178719186  
131 Christopher Street, Second Floor  
New York, New York 10014

cc: 2626 BWAY LLC (by First Class Mail and Certified Mail  
Return Receipt Requested, Receipt No. 7009141000178719193  
131 Christopher Street, Second Floor  
New York, New York 10014

cc: David Tendler, Esq. (by First Class Mail)  
Cornicello, Tendler & Baume-Cornicello LLP  
Two Wall Street, 20<sup>th</sup> Floor  
New York, NY 10005-2072



**BROADWAY METRO ASSOCIATES, L.P.**  
C/O Albert Blalek Associates  
249 West 34<sup>th</sup> Street, 2<sup>nd</sup> Floor  
New York, NY 100010  
212-751-2408

Dated: January 7<sup>th</sup>, 2010

BY: First Class Mail and Certified Mail Return Receipt Requested  
Receipt Number 7009 2820 0004 3223 26 97

2626 BWAY LLC  
c/o Seymour I. Hurwitz, Esq.  
19 W. 44<sup>th</sup> Street, Suite 1507  
New York, New York 10036

**NOTICE OF FAILURE TO COMPLY WITH ARTICLE 13 OF LEASE  
DATED SEPTEMBER 1, 2006 BETWEEN  
BROADWAY METRO ASSOCIATES, L.P. AS LANDLORD AND  
2626 BWAY LLC AS TENANT, REGARDING INSURANCE**

**PLEASE TAKE NOTICE** that pursuant to Article 13 of the Lease dated September 1, 2006 between Broadway Metro Associates, L.P. as Landlord and 2626 BWAY LLC as Tenant, ("Tenant"), hereinafter referred to as the "Lease," Tenant at all times during the Lease Term and at Tenant's expense, shall provide and maintain in full force and effect, with insurers approved by Landlord, insurance as referred to in Article 13 of the Lease, and provide the Landlord with a copy of the original insurance policies or other appropriate evidence of the existence of all policies or renewal policies bearing notations evidencing the payment of premiums therefore as referred to in Article 13 of the Lease, and under the terms and conditions as more specifically set forth in Article 13 of the Lease, a copy of which is attached hereto and made a part hereof.

**PLEASE TAKE NOTICE** that you have failed to comply with the provisions of Article 13 of the Lease in that you have failed to provide and maintain in full force and effect insurance, as more specifically set forth in and required by Article 13 of the Lease, a copy of Article 13 of the Lease is attached hereto and made a part hereof, with insurers approved by Landlord, and have not provided the Landlord with a copy of the original insurance policies or other appropriate evidence of the existence of all policies or renewal policies bearing notations evidencing the payment of the premiums therefore as referred to in Article 13 of the Lease with insurers approved by Landlord.

**PLEASE TAKE FURTHER NOTICE** that your failure to provide and maintain insurance as required by Article 13 of the Lease, and failure to provide Landlord with a copy of the original insurance policies or other appropriate evidence of the existence of all policies or renewal policies bearing notations evidencing the payment of the premiums therefore as referred to in Article 13 of the Lease with insurers approved by Landlord shall be deemed to be an Event of Default as provided for in Article 19 and 19.1.3 of the Lease if such failure to do so continues for more than thirty (30) days from the date that Tenant receives this written Notice, to wit FEB. 23, 2010 which date is more than the fifth business day after this Notice has been mailed to you by first class mail and certified mail return receipt requested pursuant to Article 39.1 of the Lease.

BROADWAY METRO ASSOCIATES, L.P.

TO: 2626 BWAY LLC

PAGE TWO

NOTICE OF FAILURE TO COMPLY WITH ARTICLE 13 OF LEASE

PLEASE TAKE FURTHER NOTICE that you should in accordance with Article 13 of the Lease provide a copy of the original insurance policy(ies) or other appropriate evidence of the existence of all policies or renewal policies bearing notations evidencing the payment of the premiums therefore as referred to in Article 13 of the Lease with insurers approved by Landlord, to the Landlord pursuant to Article 39 of the Lease, c/o Howard W. Segal, P.C., at 845 Third Avenue, Suite 1740, New York, New York 10022 no later than FEB. 23, 2010, which date is more than the fifth business day after this Notice has been mailed to you by first class mail and certified mail return receipt requested pursuant to Article 39.1 of the Lease.

Yours etc.,

BROADWAY METRO ASSOCIATES, L.P.

By: SEAVEST MANAGEMENT CORP., General Partner

By:   
ALBERT BIALEK, President

cc: Seymour I. Hurwitz, Esq., (by First Class Mail and Certified Mail

Return Receipt Requested, Receipt No. 7009 2820 0004)  
3223 2705

19 W. 44<sup>th</sup> Street, Suite 1507  
New York, New York 10036

cc: John Souto

c/o 2626 BWAY LLC (by First Class Mail and Certified Mail

Return Receipt Requested, Receipt No. 7009 2820 0004)  
3223 2710

131 Christopher Street, Second Floor  
New York, New York 10014

cc: 2626 BWAY LLC (by First Class Mail and Certified Mail

Return Receipt Requested, Receipt No. 7009 2820 0004)  
3223 2727

131 Christopher Street, Second Floor  
New York, New York 10014

cc: David Tendler, Esq. (by regular mail)

Cornicello & Tendler LLP

116 John Street, Suite 2501  
New York, New York 10038

insufficient fully to satisfy and discharge any such Imposition, and interest and penalties thereon, Landlord may pay the same and the deficiency so paid by Landlord shall be and become immediately due and payable by Tenant to Landlord.

11.3: Landlord has advised Tenant that Landlord has commenced an application for benefits under the Industrial Commercial Incentive Program of the City of New York and Tenant agrees to continue to prosecute such application to obtain the maximum benefits available to the Premises. Landlord agrees to cooperate with Tenant in the pursuing of the application.

## 12. Utility Services

12.1: Tenant shall arrange for and pay all charges for all public or private utility services and all sprinkler systems and protection services at any time rendered to or in connection with the Demised Premises or any part thereof; shall comply with all contracts relating to any such services; and shall do all other things required for the maintenance and continuance of all such services.

## 13. Insurance

13.1: Tenant, at all times during the Lease Term and at Tenant's expense, shall provide and maintain in full force and effect with insurers approved by Landlord: (a) insurance with respect to the Improvements against loss or damage by fire, lightning, winds, storm, hail, explosion, riot, riot attending strike, civil commotion, aircraft, vehicles, smoke and other risks from time to time included under "all-risk" policies, in an amount equal to at least 100% of the full replacement value of the Improvements, and in any event in an amount sufficient to prevent Landlord or Tenant from becoming a co-insurer of any loss under applicable policies, which shall be written on a replacement cost basis; (b) public liability and property damage insurance protecting Landlord against any and all liability occasioned by negligence, occurrence, accident or disaster in or about the Demised Premises or any part thereof, or the Improvements now or hereafter erected thereon, or adjoining sidewalks, curbs, vaults and vault space, if any, streets or ways, or any appurtenances thereto, in amounts reasonably approved from time to time by Landlord, which amounts at the date hereof shall be, in the case of public liability, \$1,000,000 per person and \$2,000,000 per occurrence, and in addition an umbrella liability policy in an amount of no less than \$5,000,000 and in the case of property damage, \$1,000,000; (c) rental interruption insurance which shall equal the annual Basic Rent and Additional Rent to be paid by Tenant hereunder in the succeeding twelve month period; (d) explosion insurance in respect of any steam and pressure boilers and similar apparatus located on the Demised Premises in amounts reasonably approved by Landlord, which amount at the date hereof shall be \$500,000; (e) war risk or terrorism insurance when and to the extent obtainable from the Federal government, any agency thereof or any commercial insurer; (f) appropriate workers' compensation or other insurance against liability arising from claims of workers in respect of and during the period of any work on or about the Demised Premises; (g) if the Demised Premises are located in an area which has been identified by the Secretary of

Housing and Urban Development as a flood hazard area, flood insurance in an amount at least equal to the maximum limit of coverage available for the Demised Premises under the National Flood Insurance Act of 1968; and (h) insurance against such other hazards and in such amounts as is customarily carried by prudent owners and operators of similar properties, and as Landlord reasonably may request with the reasonable written consent of the Tenant. In the event of a hazard loss the Landlord "shall cause" the net proceeds of insurance to be released to or made available to Tenant from time to time as reasonably requested to be used in connection with the restoration and repair of the damaged Demised Premises.

13.2: All insurance maintained by Tenant pursuant to this Article 13: (a) shall, except for workers' compensation insurance, name Landlord as an additional party insured, as their respective interests may appear, and shall include an effective waiver by the issuer of all rights of subrogation against any named insured or such insured's interest in the Demised Premises or any income derived therefrom; (b) shall provide that no cancellation, non-renewal, reduction in amount or material change in coverage thereof shall be effective until at least thirty (30) days after receipt by Landlord and Tenant of written notice thereof; and (c) shall be satisfactory in all other respects to Landlord acting reasonably. Any such insurance, at Tenant's option, may be provided through a blanket policy or policies in form and substance satisfactory to Landlord, provided such policies shall provide in a manner reasonably satisfactory to Landlord for specific allocation to the Demised Premises of the coverage afforded by such blanket policy or policies, and provided further that such blanket policy or policies give to Landlord no less protection than that which would be afforded by separate policies.

13.3: Upon the execution of this Lease and thereafter not less than thirty (30) days prior to the expiration date of any policy delivered pursuant to this Article 13, Tenant shall deliver to Landlord copies of the originals or other appropriate evidence of the existence of all policies or renewal policies, as the case may be, required by this Lease, bearing notations evidencing the payment of the premiums therefor.

13.4: If, at any time, Tenant shall neglect or fail to provide or maintain insurance or to deliver insurance policies in accordance with this Article 13, Landlord may effect such insurance as agent for Tenant, by taking out policies in companies selected by Landlord, and the amount of the premiums paid for such insurance shall be paid by Tenant to Landlord on demand. Landlord, in addition to Landlord's other rights and remedies, shall be entitled to recover as damages for any breach of this Article 13 the uninsured amount of any loss, liability, damage, claim, costs and expenses suffered or incurred by Landlord, and shall not be limited in the proof of damages to the amount of the insurance premium not paid by Tenant for such insurance.

13.5: Landlord shall have the right to increase the required limits of the insurance required to be provided by the Tenant hereunder to reflect changes of economic conditions, risk assessment, or other circumstances which in the Landlord's sole discretion, reasonably applied, is necessary or appropriately required to adequately protect the Landlord from unnecessary loss or damage.

**Exhibit 2**

1

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK

IN RE: Case No. 10-14731-scc  
Chapter 11  
2626 BWAY, LLC,  
Debtor.  
BROADWAY METRO One Bowling Green,  
ASSOCIATES L.P., New York, New York 10004  
Tuesday, October 12, 2010  
11:13 a.m.

TRANSCRIPT OF MOTION HEARING  
BEFORE THE HONORABLE SHELLEY C. CHAPMAN  
UNITED STATES BANKRUPTCY JUDGE

APPEARANCES:

For the Debtor: ROBERT R. LEINWAND, ESQ.  
Robinson Brog Leinwand Greene  
Genovese & Gluck, P.C.  
875 Third Avenue  
New York, New York 10022  
(212) 586-4050

ROBERT M. SASLOFF, ESQ.  
Robinson Brog Leinwand Greene  
Genovese & Gluck, P.C.  
875 Third Avenue  
New York, New York 10022  
(212) 586-4050

For Broadway Metro ANDREA J. LAWRENCE, ESQ.  
Associates: M. Teresa Daley Law Offices,  
P.C.  
520 8th Avenue, 24th Floor  
New York, New York 10018  
(212) 560-3943

M. TERESA DALEY, ESQ.  
M. Teresa Daley Law Offices,  
P.C.  
520 8th Avenue, 24th Floor  
New York, New York 10018  
(212) 560-3943



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1 MS. DALEY: Prorated.

2 THE COURT: Well if it's prorated then he's got to  
3 pay the prorate for September. He's got to pay October and  
4 he's got to pay what's due on November 1st. So he's got to  
5 pay the prorate for September, plus two months.

6 MR. LEINWAND: If it's prorated, the stub rent  
7 (indiscernible) will pay the --

8 THE COURT: The stub plus the two months.

9 MR. LEINWAND: I'll pay the two months. It -- I  
10 don't want -- the argument made -- the argument made and not  
11 finally decided by this Circuit or not finally decided by the  
12 Third Circuit is that since the payment date is the first day  
13 of the month, then the balance of that month is in fact an  
14 administration expense, but not a --

15 THE COURT: An expense for the purposes of  
16 365(d)(3)?

17 MR. LEINWAND: That's correct. And that's the  
18 argument that was made. That was the argument in -- what was  
19 the name of that (indiscernible) in Bali (phonetic) and that  
20 was the argument that the Second Circuit has adopted on the  
21 Second Circuit level.

22 THE COURT: All right, here's what I'm going to  
23 do. I'm not going to rule one way or the other on that  
24 today. And we're going to roll that question over into the  
25 subsequent hearing. But clearly, the two payments that have



1 to be made, clearly are the October and the November. So  
2 that's 48,250 times 2.

3 MR. LEINWAND: Right. We understand that, Your  
4 Honor.

5 THE COURT: Right? And that'll be due on the 60th  
6 day, which is November 2nd. Right?

7 MR. LEINWAND: I've got to add 60 --

8 THE COURT: It is.

9 MR. LEINWAND: -- September has 30 days.

10 THE COURT: October's got 31 days.

11 MR. LEINWAND: Okay. There you go.

12 THE COURT: So, I think November 2nd is the 60th  
13 day. Am I doing it right, Miss Daley?

14 MS. DALEY: Yes, Your Honor.

15 THE COURT: Okay. And look, that's the price of -  
16 - that's the cost of renting this courthouse to have a  
17 Chapter 11 case. Otherwise, you get to go back to state  
18 court and fight until the cows come home or until somebody  
19 renders a final judgment over there. But if you're filing a  
20 Chapter 11 petition and the statute makes clear what your  
21 obligations are as a debtor in possession, those have to be  
22 complied with before you get to the next step.

23 So the next step is going to be that promptly  
24 after the November 2nd day we're going to have an evidentiary  
25 hearing to determine either whether the stay should be lifted



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